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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAYNE LENOR YIGGINS, JR.,

Defendant and Appellant.

A125628

**(Lake County
Super. Ct. No. CR911566)**

Defendant Dwayne Lenor Yiggins, Jr., appeals the sentence imposed after he admitted violating his probation. His counsel initially filed a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436) advising that the record revealed no arguable issues and asking this court to independently review the record. Thereafter, defendant filed a supplemental brief asserting his entitlement to additional presentence custody credits under Penal Code section 4019 (as amended by Stats. 2009-2010 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010). We agree with defendant that the amendment is retroactive and he is thus entitled to recalculation of his presentence custody credits.

BACKGROUND

In May 2007, defendant was charged with possession of a controlled substance (cocaine) (Health & Saf. Code, § 11350, subd. (a)) and possession of marijuana for sale (Health & Saf. Code, § 11359). A prior prison term (Pen. Code, § 667.5, subd. (b)) was also alleged. Defendant pled not guilty to all counts and denied the special allegation.

On May 12, 2008, defendant pled no contest to the possession of cocaine count and, pursuant to a negotiated disposition, the possession of marijuana count was dismissed. Defendant was placed on three years' probation subject to the usual conditions, fines and fees.

On October 22, 2008, a notice of probation violation was filed alleging that defendant violated his probation by failing to participate in the drug treatment program that was a condition of his probation. On November 24, he admitted the probation violation and was reinstated on probation on the original terms and conditions.

On January 15, 2009, a second notice of probation violation was filed, alleging defendant's failure to re-enroll in a drug treatment program after his probation was restored, and commission of misdemeanor driving with a license suspended or revoked for a "DUI" (Veh. Code, § 14601.2, subd. (a)). On January 20, an order issued that summarily revoked defendant's probation and a bench warrant issued for his arrest. On February 9, defendant denied violating his probation and waived a probable cause hearing.

On May 11, 2009, defendant admitted violating his probation by committing the Vehicle Code section 14601.2, subdivision (a) violation. The failure to re-enroll allegation was dismissed pursuant to Penal Code section 1385.

At the July 13, 2009 sentencing hearing, the court followed the recommendation of the probation department and terminated defendant's probation pursuant to Penal Code section 1210.1 due to defendant's nondrug-related probation violation.

The court imposed the two-year midterm on the cocaine possession charge due to his voluntary acknowledgment of wrongdoing at an early stage of the proceedings, but noted defendant's "out of control drug problem" in finding that the aggravating circumstances outweighed those in mitigation. It also sentenced defendant to the concurrent 90-day term on the Vehicle Code section 14601.2, subdivision (a) violation. The court awarded him 15 days of credit for time served (Pen. Code, § 2900.5) and six days of conduct credit (Pen. Code, § 4019).

DISCUSSION

Defendant contends that the recent amendment to Penal Code section 4019¹ should be applied retroactively, entitling him to 30 days of presentence credits, not 21 days of credit as awarded by the trial court.

A criminal defendant is entitled to credit against his or her term of imprisonment for all days he or she spends in custody, “including days credited to the period of confinement pursuant to Section 4019.” (§ 2900.5, subd. (a).) A criminal defendant may earn additional presentence credit against his or her sentence for a willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (d)). Collectively, these forms of presentence credit are called conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Under former section 4019 (Stats. 1982, ch. 1234, § 7, p. 4553), in effect when defendant was sentenced, conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. Effective January 25, 2010, the Legislature amended section 4019 to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, may accrue conduct credit at the rate of two days for every two days of presentence custody (§ 4019, subds. (a)(4), (b)(1) & (2), (f)). If sentenced under the current version of section 4019, defendant would be entitled to an additional eight days of conduct credit. The determinative question is whether the amendment to section 4019 applies retroactively to qualified prisoners, such as defendant, whose judgments of conviction were not final at the time the amendment went into affect.

The issue of whether the recent amendment to section 4019 applies retroactively or prospectively has been addressed in numerous published opinions. Those cases express a split of opinion on the issue. The Fourth District (Div. Two), the Fifth District, and the Sixth District have held that the amendment does not apply retroactively.

¹ All further undesignated section references are to the Penal Code.

(*People v. Hopkins* (May 11, 2010, H033413, H034048) ___ Cal.App.4th ___ [2010 Cal.App. LEXIS 657]; *People v. Otubuah* (Apr. 7, 2010, E047271) ___ Cal.App.4th ___ [2010 Cal.App. LEXIS 622]; *People v. Rodriguez* (2010) 183 Cal.App.4th 1.) The First District (Divs. Two, Three and Five), the Second District (Divs. One and Six), and the Third District have held that the amendment is retroactive. (*People v. Pelayo* (May 6, 2010, A123042) ___ Cal.App.4th ___ [2010 Cal.App. LEXIS 627]; *People v. Norton* (May 5, 2010, A123659) ___ Cal.App.4th ___ [2010 Cal.App. LEXIS 612]; *People v. Delgado* (2010) 184 Cal.App.4th 271; *People v. Landon* (2010) 183 Cal.App.4th 1096; *People v. House* (2010) 183 Cal.App.4th 1049; *People v. Brown* (2010) 182 Cal.App.4th 1354.)

As this division held in *People v. Pelayo*, we agree with those courts that have determined the recent amendment to section 4019 applies retroactively, and respectfully disagree with those courts which that reached a contrary conclusion. Defendant's supplemental brief, which has not been opposed by the People, demonstrates that he is not excluded from the amendment. Consequently, he is entitled to a recalculation of his presentence custody credits.²

DISPOSITION

The judgment is reversed solely for recalculation of defendant's presentence custody credits. Defendant served 15 days of actual custody time entitling him to 14 days of conduct credit. On remand, the trial court shall revise its sentencing order and the abstract of judgment to reflect that defendant earned 29 days of presentence custody credits pursuant to section 4019. The court is directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

² In light of our conclusion, we need not address defendant's argument that a prospective application of the amendment would violate his equal protection rights.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.